Supreme Court, U.S.
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No. 00-1321

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE, INC.,

Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., MARKET HUB HOLDING COMPANY, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARKET HUB HOLDING COMPANY

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QUESTIONS PRESENTED

Whether the court of appeals correctly affirmed the district court's application of *Noerr-Pennington* immunity to Petitioner's claims, asserted under the RICO statute, arising from petitioning activity during state and federal administrative processes.

Whether immaterial misrepresentations made during state and federal administrative processes are protected by *Noerr-Pennington* immunity.

Whether the district court's dismissal of Petitioner's Complaint can be affirmed based on alternative grounds, including failure to state a valid claim for relief under the RICO statute.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Sup. Ct. R. 29.6, Respondent Market Hub Holding Company, formerly known as TPC Corporation, declares that it is 100% owned by Duke Energy Gas Transmission Corporation, which is indirectly owned by Duke Energy Corporation, a publicly-held corporation.

During the time period covered by the allegations in Petitioner's Complaint, the ultimate parent of the then TPC Corporation was PacifiCorp. PacifiCorp has certain retained liabilities relating to this litigation. PacifiCorp, formerly a publicly-held corporation, is indirectly wholly owned by Scottish Power, a publicly-held corporation.

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INTRODUCTION AND SUMMARY OF REASONS FOR DENYING PETITION

Respondent Market Hub Holding Company, formerly known as TPC Corporation ("TPC") respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Bath Petroleum Storage, Inc. ("BPSI"). TPC adopts the Brief in Opposition to Petition for Writ of Certiorari for Respondents Market Hub Partners, L.P. and Market Hub Partners, Inc. (collectively "MHP"). TPC writes separately to emphasize that *Noerr-Pennington* issues advanced by BPSI in its Petition are not squarely presented in this case.

BPSI's Petition raises two issues: (1) whether *Noerr-Pennington* immunity applies to petitioning activity that purportedly gives rise to claims under the RICO statute; and (2) whether *Noerr-Pennington* immunity extends to allegedly false but immaterial misstatements made in administrative proceedings. TPC agrees with MHP that certiorari on these issues is not warranted.

While the lower courts did not need to rule on additional issues, Respondents also sought dismissal of the complaint on the following grounds: (1) BPSI's Complaint fails to state a claim upon which relief can be granted under the RICO statute; and (2) BPSI's alleged damage resulted directly from governmental action, which provides Respondents with immunity. As a result, even if certiorari were granted, the Court could affirm either (1) without addressing *Noerr-Pennington* in the first instance; or (2) by relying on the lack of causation and the "governmental action" rule. Therefore, Petitioner's issues are not squarely presented. No "compelling reasons" warrant certiorari on this record. S. Ct. R. 10.

REASONS FOR DENYING THE WRIT

ALTERNATIVE GROUNDS FOR AFFIRMANCE APPEAR FROM THE RECORD.

The Court may affirm on any ground supported by the record. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 (1997); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted").

As shown by MHP, Petitioner mistakenly claims that a "broad conflict" exists among the circuits as to whether *Noerr-Pennington* immunity applies outside of the specific context of the Sherman Act. TPC respectfully submits that because alternative grounds support affirmance here, granting certiorari in this case cannot reasonably guarantee that Petitioner's *Noerr-Pennington* issues will be addressed.

A. The Complaint Fails to State a Claim under RICO.

While the district and circuit courts properly based their opinions on *Noerr-Pennington* immunity and the lack of causation, the record also establishes that the complaint fails to state a claim upon which relief can be granted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO").

To sustain its RICO claims, BPSI has two pleading burdens. *West Hartford v. Operation Rescue*, 915 F.2d 92, 100 (2d Cir. 1990); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

First, BPSI must allege that each named defendant has violated the substantive RICO statute; in this case 18 U.S.C. § 1962(c). *Operation Rescue*, 915 F.2d at 100. Specifically, BPSI must allege that (1) defendant TPC (2) through the commission of two or more predicate acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly conducted or participated in (6) an enterprise (7) the activities of which affected interstate or foreign commerce. *Operation Rescue*, 915 F.2d at 100; *Moss*, 719 F.2d at 17 (*citing* 18 U.S.C. § 1962).

Second, BPSI must show that it has standing, *i.e.*, that it was "injured in [its] business or property *by reason of* a violation of section 1962" by TPC. *Moss*, 719 F.2d at 17 (*citing* 18 U.S.C. § 1964(c)).

BPSI may satisfy its double burden only by alleging sufficient facts which permit a reasonable inference that all of the RICO elements have been met. Yet, "conclusory allegations or legal conclusions masquerading as factual allegations" will not do. *Fernandez-Montes v. Allied Pilots Ass'n.*, 987 F.2d 278, 284 (5th Cir. 1993) (*citing* 2A Moore's *Federal Practice*, & 12.-07[2.-5] at 12-64 n.6 (2d ed. 1991)).

"RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Western Assocs. LTD. Partnership v. Market Square Assoc.*, 235 F.3d 629, 637 (D.C. Cir. 2001) (internal quotation marks omitted).

BPSI thus may not base a RICO claim on conduct it simply deems wrongful or "inappropriate." *Complaint*, & 106 (Pet., App. 76a). BPSI must instead plead a specific pattern

of conduct amounting to "racketeering activity," defined as specific state law felonies as well as certain federal crimes. 18 U.S.C. § 1961(1).

BPSI has not met — and cannot meet — its pleading burdens. BPSI's complaint: (1) is grounded in conduct that is not "racketeering activity" as defined under the statute; (2) fails to describe the necessary "pattern" of racketeering activity required by RICO; (3) does not demonstrate the existence of a viable RICO "enterprise"; and (4) fails to allege that BPSI has suffered harm as the result of a racketeering activity, and thus fails to allege standing. *See* Pet., App. 45a-96a.

BPSI in the main alleges garden-variety tortious conduct, which is insufficient under RICO. To fit under the RICO umbrella, BPSI attempts to rely on mail and wire fraud. *See Complaint*, & 6 (Pet., App. 47a). Yet BPSI fails to plead adequately the commission of either of those crimes, much less to satisfy the pattern requirement. "If the pattern requirement has any force whatsoever, it is to prevent . . . ordinary commercial fraud from being transformed into a federal RICO claim. . . . If we were to recognize a RICO claim based on the narrow fraud alleged here, the pattern requirement would be rendered meaningless." *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 685 (4th Cir. 1989).

Because the complaint fails to state a valid claim for relief under RICO in the first instance, it would not be necessary for this Court to reach the issue of whether *Noerr-Pennington* applies to Petitioner's RICO claims. The Petition should be denied.

B. BPSI's Alleged Harm Resulted from "Governmental Action," thereby Immunizing Respondents from Liability.

Petitioner argues that review is necessary on the question of whether immaterial misstatements constitute an independent exception to *Noerr-Pennington* immunity, apart from the traditional "sham" exception. The record demonstrates that the Court could affirm without directly addressing the immaterial misstatement exception issue raised by Petitioner. The Court has long recognized that because *Noerr-Pennington* immunity focuses on the petitioning process itself, if a defendant attempts to "disrupt" a competitor's "business relationships . . . through the ultimate product of that lobbying and consideration," no liability attaches to the conduct. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 381 (1991). A "sham" arises only where "the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." *Id. See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir.) (holding that when alleged antitrust injuries "flow[] directly from governmental action," the claim is taken "entirely out of" the sham exception), *cert. denied*, 513 U.S. 813 (1994).

In its complaint, BPSI expressly acknowledged that it was harmed not by MHP's lobbying efforts, but by the government action itself that was the subject matter of the public administrative proceedings related to Petitioner's permit applications. *See Complaint*, ¶¶ 10, 11, 87, 90, 91, 101, 104, 105, 106, 107, 108, 109, 111, 112, 113, 119 (Pet., App. 48a, 69a, 70a, 75a-79a, 82a). Notably, for example, the Federal Energy Regulatory Commission *granted* MHP's request for a cease and desist order. (*Id.* at 33a-34a).

In that instance, it was undisputedly the order itself, not the process used to obtain the order, that allegedly damaged Petitioner. (*Id.* at 41a-42a). The same reasoning holds true for Petitioner's other alleged damages.

The record is clear that any claimed injuries were not caused by the alleged immaterial representations. This is so precisely because the alleged misrepresentations were, by definition, immaterial. Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way. *See* Pet., App. at 3a, 29a-42a. Petitioner's injuries were caused, if at all, directly by governmental action. Thus, "there is state action at issue here, not private conduct." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1037, n.11 (3d Cir.), *cert. denied*, 522 U.S. 907 (1997). The complaint's allegations, considered in light of the administrative record, are sufficient to conclude that Petitioner's claims are taken "entirely out of" the traditional sham exception under *Noerr-Pennington*. *Sessions Tank Liners, Inc.*, 17 F.3d at 299.

BPSI apparently seeks to avoid the state action limitation on liability by implicating the New York Department of Environmental Conservation in the alleged scheme to destroy BPSI's business. The district court properly rejected this argument because there is no "conspiracy exception" to *Noerr-Pennington* for conduct undertaken between state and private actors. *Omni Outdoor Advertising*, 499 U.S. 365, 383 (1991) ("a 'conspiracy' exception to *Noerr* must be rejected.").

Petitioner's *Noerr-Pennington* issues are not squarely raised. Petitioner's claimed damage resulted, if at all, directly from state action.

CONCLUSION

Based on the foregoing, as well as the reasons set forth in MHP's Brief in Opposition, the Petition should be denied.

Respectfully submitted,

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